Chong Thian Fook & Ors v Sarawak Shell Bhd & Ors and another appeal

FEDERAL COURT (KUCHING) — APPEAL NOS 02–41 OF 2007(Q) AND 02–42 OF 2007(Q)
RICHARD MALANJUM CJ (SABAH AND SARAWAK), ARIFIN ZAKARIA AND NIK HASHIM FCJJ
11 JUNE 2009

Labour Law — Provident fund — Contributions — Retirement benefit fund — Allegations of wrongful deductions — Whether Court of Appeal erred in interpretation of provisions of fund regulations — Whether respondents estopped from denying after admitting to making deductions — Whether deductions contravened s 9(1) of the Employees Provident Fund Act 1951 and s 47(1) of the Employees Provident Fund Act 1991 — Whether ultra vires

The appellants/plaintiffs were the former employees of the first and second respondents/defendants ('respondents'). The appellants, by virtue of being employees of the respondents were members of the Sarawak and Sabah Retirement Benefit Fund ('RBF'). Some 57 appellants were also members of the Shell Sabah and Sarawak Provident Fund ('the PF'). Both RBF and PF were established by the first and second respondents for the benefit of their employees. The PF which replaced the Shell Borneo Thrift Fund was a contributory domestic pension fund covering all categories of Malaysian employees of the first and second respondents. The RBF which came into effect from 1 January 1976 vide a Trust Deed ('the RBF Trust Deed') and the Regulations annexed thereto ('the 1976 Regulations') replaced the Shell Sarawak and Sabah Pension Fund. Since the RBF was not a contributory fund, in that its employee members did not contribute to it, its sources of income were contributions from member companies and other sources. The RBF was managed by the third to sixth respondents, the trustees to the fund. The Employees Provident Fund ('the EPF') was introduced to Sabah and Sarawak in 1968 and 1969 respectively, through the Employees Provident Fund Act 1951 ('the EPF Act 1951') which was subsequently replaced by the Employees Provident Fund Act 1991 ('the EPF Act 1991'). According to the appellants, reg 5(2) of the 1976 Regulations to the RBF Trust Deed had provided for deductions to be made to the employers' contribution to arrive at the retirement benefit payable to the appellants, and that such deductions had in fact been carried out by the third to sixth respondents, as trustees to the fund, throughout the administration of the fund before making a net payment to the ex-employees. It was the appellants' claim that these

A deductions, which according to the respondents were 'authorised deductions' under reg 7(1)(c) of the 1976 Regulations, were not merely deductions of the employers' contributions but included the dividends declared by the EPF on the sums standing to the credit of the ex-employees of the first and second respondents. As such the appellants claimed that such deductions, whether B authorised or not, were ultra vires under s 9(1) of the EPF Act 1951 and under s 47(1) of the EPF Act 1991. The appellants therefore instituted the present action against the respondents claiming that they had not received what they had envisaged as their retirement benefits under the RBF. At the court of first instance the core issue determined was whether the reduction of C the retirement benefits under reg 5(2) of the 1976 Regulations pursuant to 'authorised deductions' made by the third to sixth respondents under reg 7(1)(c) of the 1976 Regulations was valid and proper. After due consideration the High Court found, inter alia, that reg 5(2) of the 1976 Regulations read with reg 7(1)(c) of the 1976 Regulations contravened s 9(1) D of the EPF Act 1951 and s 47(1) of the EPF Act 1991 and that all deductions from the RBP by the first and/or second respondents of their contributions to the EPF and/or PF for the appellants were illegal, null and void. At the same time the High Court refused to grant the appellants' prayers against the respondents concerning unjust enrichment and breach of trust. On appeal by E the respondents, the Court of Appeal reversed the High Court decision and held, inter alia, that the aim of the employers in establishing the RBF was to ensure that the employee will enjoy retirement benefits at the end of his service from all sources of at least a certain amount and that therefore if the benefits from sources other than the RBF did not come up to that amount F then the RBF would come in to make up for the deficiency, and if there was no deficiency the target of the RBF was reached and there was nothing due from the RBF. In short the benefit due stipulated in reg 5 of the 1976 Regulations was held to be a top up or the net benefit payable to the appellants as members of the fund. The Court of Appeal allowed the G respondents' appeal without entering into a deliberation of the arguments concerning reg 7(1)(c) of the 1976 Regulations and the two EPF sections, stating that this was not required in order to dispose of the appeal. At the same time, the appellants also appealed against the High Court's refusal to grant their prayers concerning unjust enrichment and breach of trust but the H Court of Appeal dismissed that appeal. Dissatisfied with the decisions of the Court of Appeal the appellants sought and obtained leave to proceed with the present two appeals. The appellants categorised the grounds of appeal in their first appeal into four heads, which in turn required the court to determine the following issues, namely: whether the Court of Appeal had erred in its I interpretation of certain provisions and terminologies as used in regs 5, 7 and 8 of the 1976 Regulations and thereby misunderstood the practical workings of the RBF; whether the respondents as trustees of the RBF had admitted to making deductions throughout the administration of the fund and were now estopped from denying or repudiating such deductions; whether the

deductions by the respondents contravened s 9(1) of the EPF Act 1951 and s 47(1) of the EPF Act 1991 and were therefore ultra vires. A

Held, dismissing the appeals with costs: B

(1) When construing provisions dealing with a pension fund it is necessary to bear in mind the overall background of the scheme and to embark on an approach that is 'practical and purposive rather than detached and literal'. The one basic approach that should be adopted is to begin calculating first the level of benefit as stipulated in reg 5(3) of the 1976 Regulations and then proceeding to determine the aggregate amount in accordance with reg 5(2). If the quantum level of benefit is higher than the aggregate amount obtained under reg 5(2) then a lump sum from the fund is to be obtained to bring the aggregate sum to the level of benefit as stipulated in reg 5(2). However, the matter does not rest there and the last sentence of reg 5(2) which requires the lump sum to be reduced by the 'authorised deductions' in reg 7(1)(c) still needs to be considered. The Court of Appeal construed these words to mean the deductions 'in calculating the amount of a member's benefit' when he leaves the company. Having considered the relevant provisions and the purpose of the fund as a whole it would appear that this was the right construction. In any case this was a finding of fact that should not be interfered casually (see paras 32, 34–38). C D E

(2) The Court of Appeal was also right in arriving at the conclusion that there was no contravention of any of the relevant provisions under s 9(1) of the EPF Act 1951 and under s 47(1) of the EPF Act 1991. The RBF could not have been established with an ulterior motive and if indeed the fund was established with some improper and illegal purpose then no one should benefit out of it including the appellants. In any case there was no direct allegation that the appellants did not receive their EPF benefits but only that they were hoping to receive additional benefits out of the fund (see paras 43 & 44). F G

(3) The court agreed with the views of the Court of Appeal that the funds such as the EPF and the PF did not come within the ambit of reg 7(1)(c) of the 1976 Regulations. This regulation read as a whole could not have been intended to include contributions into funds such as the EPF for otherwise this would have been expressly stated in reg 7(1)(c). In fact, reg 7(1)(c) of the 1976 Regulations is more related to any additional payments made or due to a member of RBF but does not extend to contributions described in reg 5 of the 1976 Regulations (see para 45). H I

(4) On the issue of admission and estoppel the Court of Appeal found that where the respondents admitted making deductions they meant deductions in the arithmetical or accounting sense, ie deductions for the purpose of determining the lump sum to which the plaintiffs were entitled from the RBF and not the deprivative deductions as alleged by the plaintiff. A careful scrutiny of the Court of Appeal's analysis of this issue showed that this finding was well-reasoned having regard to the relevant provisions in the 1976 Regulations. Further, since the issue of estoppel was not raised by the appellants in the lower courts as a general rule it could not be raised in the present appeal. In addition the species of estoppel raised by the appellants was not within any of the exceptions to the general rule (see paras 49–50 & 53).

(5) The issue of ultra vires was already considered when considering the proper interpretation to be given to reg 5 of the 1976 Regulations and as held by the Court of Appeal there were no such deductions made. Thus this issue was without merit (see paras 58 & 60).

(6) In respect of the second appeal the Court of Appeal found that since the issues of unjust enrichment and breach of trust were premised that there had been wrongful deductions and since in its judgment there were no such deductions the appeal had to be dismissed with costs. This was the right approach to take and accordingly the second appeal should also be dismissed with costs (see paras 62–65).

[Bahasa Malaysia summary

Perayu-perayu/plaintif-plaintif merupakan bekas pekerja responden-responden/defendan-defendan pertama dan kedua. Perayu-perayu, sebagai pekerja responden-responden merupakan ahli 'Sarawak and Sabah Retirement Benefit Fund' ('RBF'). Seramai 57 perayu juga merupakan ahli 'Shell Sabah and Sarawak Provident Fund' ('PF'). Kedua-dua RBF dan PF tersebut ditubuhkan oleh responden-responden pertama dan kedua bagi kepentingan pekerja-pekerja mereka. PF yang menggantikan 'Shell Borneo Thrift Fund' merupakan sumbangan tabung pencen domestik yang meliputi semua kategori pekerja Malaysia responden-responden pertama dan kedua. RBF yang berkuat kuasa dari 1 Januari 1976 menerusi suatu suratcara amanah ('surat cara amanah RBF') dan Peraturan-Peraturan yang dilampirkan sekali ('Peraturan-Peraturan 1976') menggantikan 'Shell Sarawak and Sabah Pension Fund'. Kerana RBF bukanlah tabung sumbangan, maka pekerja-pekerjanya tidak menyumbang ke dalamnya, sumber kewangannya adalah sumbangan daripada syarikat-syarikat ahli dan sumber-sumber lain. RBF diuruskan oleh responden-responden ketiga hingga keenam, pemegang amanah tabung tersebut. Kumpulan Simpanan Wang Pekerja ('KWSP') diperkenalkan ke

Sabah dan Sarawak dalam tahun 1968 dan 1969, menerusi Akta Kumpulan Simpanan Wang Pekerja 1951 ('Akta KWSP 1951') yang kemudiannya digantikan dengan Akta Kumpulan Simpanan Wang Pekerja 1991 ('Akta KWSP 1991'). Menurut perayu-perayu, perautan 5(2) Peraturan-Peraturan 1976 kepada surat cara amanah RBF memperuntukkan potongan perlu dibuat atas sumbangan majikan bagi mencapai faedah saraan boleh bayar kepada perayu-perayu, dan potongan tersebut sebenarnya telah dilakukan oleh responden-responden ketiga hingga keenam, sebagai pemegang amanah tabung tersebut, sepanjang pentadbiran tabung tersebut sebelum membuat bayaran bersih kepada bekas-bekas pekerja. Perayu-perayu mendakwa bahawa potongan-potongan tersebut, yang mana menurut responden-responden merupakan 'potongan yang dibenarkan' di bawah peraturan 7(1)(c) Peraturan-Peraturan 1976, bukanlah hanya potongan daripada sumbangan majikan tetapi termasuk juga dividen yang diisytiharkan oleh KWSP atas jumlah kedudukan kredit bekas-bekas pekerja responden pertama dan kedua. Maka, perayu-perayu mendakwa bahawa potongan tersebut, sama ada dibenarkan atau tidak, adalah ultra vires s 9(1) Akta KWSP 1951 dan s 47(1) Akta KWSP 1991. Perayu-perayu memulakan tindakan ini terhadap responden-responden mendakwa bahawa mereka tidak menerima apa yang mereka jangkakan sebagai faedah-faedah persaraan di bawah RBF. Di mahkamah pada permulaannya, isu pokok yang telah dipastikan adalah sama ada pengurangan faedah-faedah persaraan di bawah peraturan 5(2) Peraturan-Peraturan 1976 berkaitan 'authorised deductions' yang dibuat oleh responden-responden ketiga hingga keenam di bawah peraturan 7(1)(c) adalah sah dan teratur. Selepas penelitian, Mahkamah Tinggi mendapati, antara lain, bahawa peraturan 5(2) Peraturan-Peraturan 1976 dibaca bersama peraturan 7(1)(c) bercanggah dengan s 9(1) Akta KWSP 1951 dan s 47(1) Akta KWSP 1991 dan kesemua potongan daripada RBP oleh responden pertama dan/atau responden kedua atas sumbangan mereka ke atas KWSP dan/atau PF perayu-perayu adalah menyalahi undang-undang, batal dan tak sah. Pada masa yang sama, Mahkamah Tinggi enggan membenarkan permohonan-permohonan perayu-perayu berkenaan pengkayaan tak patut dan pecah amanah terhadap responden-responden. Atas rayuan oleh responden-responden, Mahkamah Rayuan mengakas keputusan Mahkamah Tinggi dan memutuskan, antara lain, bahawa tujuan majikan menubuhkan RBF tersebut adalah untuk memastikan pekerja menikmati faedah-faedah persaraan pada akhir zaman pekerjaannya daripada semua sumber, sekurang-kurangnya pada jumlah tertentu dan jika faedah-faedah daripada sumber-sumber selain RBF tidak mencapai jumlah tersebut, maka RBF akan menambah kekurangan tersebut, dan jika tiada kekurangan, matlamat RBF telah tercapai dan tiada apa yang terakru daripada RBF. Ringkasnya, faedah-faedah yang dinyatakan dalam peraturan 5 Peraturan-Peraturan 1976 diputuskan sebagai penambahan atau faedah bersih perlu dibayar kepada perayu-perayu sebagai ahli tabung tersebut. Mahkamah Rayuan membenarkan rayuan responden-responden tanpa mempertimbangkan

hujah-hujah berkenaan peraturan 7(1)(c) Peraturan-Peraturan 1976 dan dua seksyen Akta KWSP, menyatakan bahawa perkara tersebut tidak perlu bagi rayuan tersebut. Pada masa yang masa, perayu-perayu juga merayu terhadap keengganan Mahkamah Tinggi membenarkan permohonan mereka berkaitan pengkayaan tak patut dan pecah amanah tetapi Mahkamah Tinggi menolak rayuan tersebut. Tidak berpuas hati dengan keputusan Mahkamah Rayuan itu, perayu-perayu memohon dan mendapat keizinan untuk meneruskan dengan kedua-dua rayuan ini. Perayu-perayu mengkategorikan alasan-alasan rayuan mereka kepada empat tajuk, yang mana memerlukan mahkamah menentukan isu-isu ini, iaitu: (1) sama ada Mahkamah Rayuan khilaf dalam mentafsirkan beberapa peruntukan dan terminologi-terminologi dalam peraturan-peraturan 5, 7 dan 8 Peraturan-Peraturan 1976 tersebut dan telah salah tanggap tentang pengaturcaraan praktik RBF; (2) sama ada responden-responden sebagai pemegang amanah RBF telah mengaku membuat potongan sepanjang pentadbiran tabung tersebut dan sekarang diestop daripada menafikan atau tidak mengakui akan pemotongan tersebut; dan (3) sama ada potongan-potongan oleh responden-responden bercanggah dengan s 9(1) Akta KWSP 1951 dan s 47(1) Akta KWSP 1991 dan oleh itu, ultra vires.

Diputuskan, menolak rayuan-rayuan dengan kos:

(1) Apabila mentafsirkan peruntukan-peruntukan berkaitan dengan tabung pencen adalah perlu untuk mengambil kira keseluruhan latar belakang skim itu dan mengambil pendekatan '*practical and purposive rather than detached and literal*'. Satu pendekatan asas yang perlu diambil ialah untuk mengira tahap faedah seperti yang dinyatakan dalam peraturan 5(3) Peraturan-Peraturan 1976 tersebut dan seterusnya menentukan jumlah aggregat berikutan dengan peraturan 5(2). Jika tahap kuantum faedah tersebut lebih tinggi daripada jumlah aggregat yang didapati di bawah peraturan 5(2), maka suatu jumlah besar bagi tabung itu hendaklah dikira bagi menyamakan jumlah tersebut dengan tahap faedah di bawah peraturan 5(2). Tetapi, perkara tersebut tidak selesai di situ sahaja, dan ayat terakhir peraturan 5(2) yang memerlukan jumlah besar itu dikurangkan berikutan '*authorised deductions*' dalam peraturan 7(1)(c) masih perlu dipertimbangkan. Mahkamah Rayuan mentafsirkan ayat-ayat tersebut bermaksud potongan-potongan itu '*in calculating the amount of a member's benefit*' apabila dia meninggalkan syarikat tersebut. Setelah mempertimbangkan peruntukan-peruntukan yang relevan dan juga tujuan tabung tersebut keseluruhannya, maka didapati bahawa tafsiran tersebut adalah tepat. Walau apa pun, ini merupakan penemuan fakta yang tidak patut dicampuri sewenang-wenangnya (lihat perenggan 32, 34–38).

(2) Mahkamah Rayuan juga membuat keputusan yang tepat bahawa ia mendapati tiada percanggahan terhadap mana-mana peruntukan di bawah s 9(1) Akta KWSP 1951 dan juga s 47(1) Akta KWSP 1991. RBF tersebut tentunya tidak ditubuhkan dengan tujuan yang tersembunyi dan walaupun tabung tersebut ditubuhkan dengan tujuan yang menyalahi undang-undang dan salah, maka tiada siapa pun akan mendapat faedah darinya, termasuklah perayu-perayu. Walau apa pun, tiada dakwaan secara langsung bahawa perayu-perayu tidak menerima faedah-faedah KWSP mereka tetapi mereka hanya berharap menerima faedah-faedah lain daripada tabung tersebut (lihat perenggan 43 & 44).

(3) Mahkamah bersetuju dengan pandangan Mahkamah Rayuan bahawa tabung-tabung seperti KWSP dan PF tidak terangkum dalam peraturan 7(1)(c) Peraturan-Peraturan 1976 tersebut. Peraturan ini, dibaca secara keseluruhannya tidak bertujuan untuk memasukkan sumbangan-sumbangan ke atas tabung-tabung seperti KWSP kerana jika ianya bertujuan sedemikian, tentunya dinyatakan dengan jelas dalam peraturan 7(1)(c). Malah, peraturan 7(1)(c) tersebut lebih berkait dengan bayaran-bayaran tambahan yang telah dibuat atau terakru ke atas ahli RBF tetapi tidak meliputi sumbangan-sumbangan yang dinyatakan dalam peraturan 5 Peraturan-Peraturan 1976 tersebut (lihat perenggan 45).

(4) Atas isu pengakuan dan estopel, Mahkamah Rayuan mendapati bahawa apabila responden-responden mengakui telah membuat potongan-potongan, ia bermaksud potongan-potongan dalam erti kata aritmetik atau perakaunan, iaitu, potongan-potongan bagi tujuan menentukan jumlah besar yang mana plaintif-plaintif berhak atas RBF tersebut dan bukannya potongan-potongan yang menafikan hak mereka seperti yang didakwa oleh plaintif. Penelitian yang terperinci atas analisa Mahkamah Rayuan tentang isu ini menunjukkan bahawa keputusan ini adalah wajar dan mengambil kira peruntukan-peruntukan relevan Peraturan-Peraturan 1976. Selanjutnya, memandangkan isu estopel tidak dibangkitkan oleh perayu-perayu di mahkamah-mahkamah rendah sebelum ini, hukum amnya ialah isu ini tidak boleh dibangkitkan dalam rayuan ini. Tambahan pula, jenis estopel yang dibangkitkan oleh perayu-perayu tidak terangkum dalam mana-mana pengecualian kepada aturan am (lihat perenggan 49–50 & 53).

(5) Isu ultra vires telah pun dipertimbangkan apabila menimbangkan pentafsiran tepat atas peraturan 5 Peraturan-Peraturan 1976 tersebut dan seperti yang diputuskan oleh Mahkamah Rayuan, tiada potongan-potongan sebegitu yang dibuat. Maka, isu ini tidak bermerit (lihat perenggan 58 & 60).

A (6) Berkaitan dengan rayuan kedua, Mahkamah Rayuan mendapati bahawa isu-isu pengkayaan tak patut dan pecah amanah adalah berdasarkan kepada wujudnya potongan-potongan salah dan memandangkan dalam penghakimannya tiada potongan-potongan sebegitu didapati, rayuan tersebut harus ditolak dengan kos. Ini
B merupakan pendekatan yang tepat yang harus diambil dan rayuan kedua ini juga harus ditolak dengan kos (lihat perenggan 62–65).]

Notes

C For cases on contributions of provident fund, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1596–1601.

Cases referred to

Banbury v Bank of Montreal [1918] AC 626, HL (refd)

D *British Airways Pension Trustees Ltd v British Airways* [2002] PLR 247 (refd)

Hua Daily News Bhd v Tan Thien Chin & Ors [1986] 2 MLJ 107, SC (refd)

Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Ors [1989] 1 MLJ 457; [1989] 1 CLJ 1 (Rep), PC (refd)

E *Mettoy Pension Trustees Ltd v Evans & Ors* [1990] 1 WLR 1587, Ch D (refd)

Muniandy & Anor v Muhammad Abdul Kader s/o Muhamad Saheed & Ors [1989] 2 MLJ 416; [1989] 2 CLJ 577, SC (refd)

Redrow Plc v Pedley [2002] PLR 339 (refd)

F *Steria Limited & Ors v Ronald Hutchinson & Ors* [2006] EWCA Civ 1551, CA (refd)

Vistafjord, The [1988] 2 Lloyd's Rep 343 (refd)

Yong Mok Hin v United Malay States Sugar Industries Ltd [1967] 2 MLJ 9, FC (refd)

G

Legislation referred to

Courts of Judicature Act 1964 s 96(a)
Employees Provident Fund Act 1951 s 9(1)
Employees Provident Fund Act 1991 s 47, 47(1)
H Rules of the High Court 1980 O 14A

Appeal from: Civil Appeal Nos Q–02–1177 of 2004 and No Q–02–1075 of 2004 (Court of Appeal, Putrajaya)

I

Cyrus Das (Eric Khoo and Gabriel Kok with him) (Khoo & Co) for the appellants.

Robert Ham (Cecil Abraham and Jimmy Wee with him) (Jimmy HT Wee & Co) for the respondents.

Richard Malanjum CJ (Sabah and Sarawak) (delivering judgement of the court):

INTRODUCTION

[1] There are two appeals before this court. The appellants are dissatisfied with the decisions of the Court of Appeal allowing:

(a) the appeal by the respondents against the decision of the High Court, hence the first appeal; and

(b) in dismissing their appeal against the refusal by the High Court to grant their prayers concerning unjust enrichment and breach of trust, hence the second appeal.

[2] However, the bulk of the issues are the first appeal.

[3] The courts below have succinctly dealt with the background facts. Thus, in this judgment we need only refer to some of the salient facts essential in determining the issues submitted.

[4] The appellants (plaintiffs at the court of first instance) are former employees of the first and second respondents (defendants at the court of first instance). As employees of the respondents the appellants were members of the Sarawak and Sabah Retirement Benefit Fund ('the RBF'). Another fund called the Shell Sabah and Sarawak Provident Fund ('the PF') had 57 of the appellants as members.

[5] It was not in dispute that both RBF and PF were established by the first and second respondents as trust funds for the benefit of their employees. They came about with the dissolutions of their precursors which were established prior to 1970.

[6] However, we do not think the detailed historical aspects of these funds are pivotal in the determination of the issues which confront us.

[7] Suffice it to say that PF replaced the Shell Borneo Thrift Fund ('SBTF') in or around 8 March 1968. While SBTF was a contributory pension fund for the labour category of the employees of the first and second respondents, PF was contributory domestic provident fund covering all categories of Malaysian employees of the first and second respondents. PF governing instruments were the Provident Fund Trust Deed dated 8 March 1968 and the Regulations annexed thereof ('the Provident Fund Trust Deed 1968' and

A 'the Regulations 1968'). PF members made or could make contributions and the employer companies in turn made or had to make contributions in respect of each contributing member.

B **[8]** In respect of RBF it came into effect from 1 January 1976 vide a Trust Deed of 6 December 1976 and the regulations annexed thereto ('the Retirement Benefit Fund Trust Deed 1976' and 'the Regulations 1976') formulated by the 'Member Companies' consisting of the first and second respondents and several other Shell companies with the desire to establish RBF 'for the benefit of those of their employees whose domicile in Sarawak C or Sabah'. RBF replaced Shell Sarawak and Sabah Pension Fund ('SSS Pension Fund'). Earlier on, in or around 8 March 1968 SSS Pension Fund replaced the Shell Malaya Retiring Fund ('SMRF'). The earlier successive Funds were non-contributory meant for the staff category employees of the first and second respondents.

D

[9] RBF was also not a contributory fund in that its employee members did not contribute. The sources of the income were contributions from the member companies and other sources. The fund was managed by trustees. The third to sixth respondents herein were the trustees to the fund.

E

[10] The Employees Provident Fund Act 1951 ('1951 Act') was extended to Sarawak on 11 March 1968 and Sabah on 1 September 1969. It introduced the Employees Provident Fund ('EPF') into the two states. Under the 1951 Act the first and second respondents were required to make the F stipulated statutory contributions for the appellants as their employees who were also members of EPF. Subsequently the Employees Provident Fund Act 1991 ('1991 Act') replaced the 1951 Act.

G **[11]** The grievance of the appellants came about when they did not receive what they had envisaged as their retirement benefits under RBF. This is how it was put before us by learned counsel for the appellants:

> The thrust of the plaintiffs case all through has been that the relevant formula for H the calculation of retirement benefits in the RBF Trust Deed provided for deduction of the employers' contribution to the EPF to arrive at the retirement benefit payable, and that such deduction had in fact been carried out by the trustees throughout the administration of the fund before making a net payment to the ex-employees. Indeed the deductions were not merely of the employers' contributions but included the dividends declared by the EPF on the sums I standing to the credit of the ex-employees. Such deductions, whether authorised by the formula or not, was ultra vires s 9(1) of the Employees' Provident Fund Ordinance (sic) 1951 and s 47(1) of the Employees Provident Fund Act 1991.

[12] At the court of first instance the learned judicial commissioner was of the view that 'the core issue is whether the 'reduction' of the retirement benefits under regulation 5(2) of the Regulations 1976 to the RBF Trust Deed pursuant to 'authorised deductions' made by the trustees under Regulation 7(1)(c) of the same Regulations is valid and proper. This in turn depends on the construction placed on the meaning of 'authorised deductions' found in Regulation 7(1)(c); and based on the pleadings in this instant case, the meaning to the term 'authorised deductions' in Regulation 7(1)(c) must be construed in the light of the provisions of section 47(1) of the EPF Act 1991 and its predecessor section 9(1) of the EPF Act 1951'.

[13] After considering the arguments presented together with the relevant affidavits as the proceeding went by way of O 14A of the Rules of the High Court 1980 the learned judicial commissioner granted the appellants' prayers, inter alia:

(1) A declaration that reg 5(2) read with the reg 7(1)(c) of the Retirement Benefit Fund ('the RBF') Trust Deed and Regulations of 1976 (as updated in 1993 and 1996) contravenes s 9(1) of the Employees Provident Fund Act 1951 (until its repeal on 1 June 1991) and was accordingly ultra vires the Employees Provident Fund Act 1951.

(2) A declaration that reg 5(2) read with reg 7(1)(c) of the RBF Trust Deed and Regulations of 1976 (as updated in 1993 and 1996) contravenes s 47(1) of the Employees Provident Fund Act 1991 and is accordingly ultra vires the Employees Provident Fund Act 1991.

(3) A declaration that all deductions from the RBF by the first and/or second defendants of their contributions to the EPF for the plaintiffs and for the interest and/or dividends which were declared by the EPF in favour of the plaintiffs, throughout the plaintiffs' tenure of service with the first and second defendants, are illegal, null and void.

(4) A declaration that all deductions from the RBF by the first and/or second defendants of their contributions for the plaintiffs to the PF and for the interests generated thereon throughout the plaintiffs' tenure of service with them, are illegal, null and void.

[14] On appeal by the respondents the Court of Appeal reversed the decision of the learned judicial commissioner. It held, inter alia, that 'the aim of the employers in establishing the RBF was to ensure that at the end of his service an employee will enjoy, or will have enjoyed, retirement benefits from all sources of at least a certain amount. If the benefits from sources other than the RBF — that is the accrued benefits — do not come up to that amount, then the RBF will come in to make up for the deficiency by supplying it. The target amount is the level of benefit and the supplied deficiency is the benefit

due from the RBF. It is a top-up. If there is no deficiency, the target of the RBF is reached and nothing is due from the RBF ... It is elementary that, arithmetically or accounting-wise, to arrive at the lump sum sufficient to bring the aggregate of the accrued benefits up to the level of benefit specified in sub-cl (3), all that needs to be done is to subtract or deduct the accrued benefits from the level of benefit and arrive at the difference or the top-up, which, if any, will be the lump sum'.

[15] As regards the deductions and the relevant provisions of the EPF Acts the Court of Appeal opined that since the appellants 'would not have been driven to construe that regulation in the way that has been done in this appeal and in the High Court had they not held the notion that the lump sum was the level of benefit, and since that notion is patently wrong', the respondents' appeal 'has to be allowed without the necessity of entering upon a deliberation of the arguments concerning reg 7(1)(c) and the two EPF sections and making a reasoned finding as to the correctness of the High Court's declarations concerning that regulation. It would be a purely academic exercise, and one of a very involved nature, that is not required to be carried out in order to dispose of appeal ...'.

[16] The appellants then sought leave to appeal before this court. After hearing arguments in respect of the first appeal leave on twelve questions was granted pursuant to s 96(a) of the Courts of Judicature Act 1964. Premised on those questions the appellants submitted twelve grounds of appeal. Learned counsel for the appellants in his submission categorised these grounds to four heads, namely:

(a) Admission and Estoppel (Grounds 3–4, 7–8);

(b) Interpretation (Grounds 1–2, 5–6 and 9);

(c) Ultra Vires (Grounds 10–11); and

(d) Limitation (Ground 12).

[17] Learned counsel also summarised the complaint of the appellants against the judgment of the Court of Appeal as follows:

(a) failing to appreciate that it was dealing with a closed fund and therefore the way the formula was applied throughout the life of the fund, involving deductions in fact, must surely be a critical factor in answering the plaintiffs' claims;

(b) misconstruing the formula, and introducing the notion of an arithmetical deduction in the formula which was a point not contended for by the defendants themselves; and

(c) from the outset the Court of Appeal misunderstood the plaintiffs case

on the formula to be a contention that 'the lump sum' was 'the level of benefit.

INTERPRETATION (GROUNDS 1–2, 5–6 and 9)

[18] Although this head is placed second in the categorisation by learned counsel for the appellants we think it is pivotal in the determination of this first appeal. We will therefore deal with it first.

[19] The basic source of the appellants' grievance is on the interpretations given to certain provisions and terminologies used in regs 5, 7 and 8 of the Regulations 1976 governing RBF. The relevance of s 9(1) of the 1951 Act and s 47 of the 1991 Act also came to the fore.

[20] For convenience the relevant provisions are reproduced:

The Regulations 1976

Regulations 5(1), (2) and (3) read:

5(1) When a Member leaves Company Service (other than a Member who dies in Company Service) the benefit due from this Fund shall be calculated in accordance with the following provisions of this Regulation and the net amount thereof shall be settled in accordance with Regulation 8. No benefit shall be due to a Member who leaves Company Service, other than at age 55 or because of chronic disability, with less than 5 years' Accredited Service (unless in view of some exceptional circumstances the Trustees at the request of the Employing Company determine otherwise).

(2) The benefit due from this Fund shall be a lump sum sufficient to bring the aggregate of:

(a) so much of a Member's balance at the time he leaves Company Service as amounts to:

(aa) contributions for the period prior to 1st January 2001;

and

(bb) contributions in respect of basic salary plus annual bonus for the period commencing 1st January 2001;

made by his Employing Company or Companies for the time being (whether or not such Company or Companies are Member Companies of the Fund) during any period which counts as Accredited Service, plus interest thereon in:

(i) the Local Provident Fund, and

(ii) the State Fund, and

(iii) such other funds as the Trustees may from time to time designate for the purposes of this sub-clause; and

(b) the benefit (if any) actually paid by this Fund or by any such fund as is mentioned in or designated under paragraph (a) of this sub-clause in respect of any previous period of Company Service which is included in his Accredited Service,

up to the level of benefit specified in sub-clause (3) hereof. In every case the lump sum shall be reduced by the Authorised Deductions mentioned in Regulation 7.

(3)(a)The level of benefit applicable to a Member who:

(i) has reached age 55, or

(ii) has reached age 50 and has left Company Service with the consent of his Employing Company, or

(iii) has left Company Service because of chronic disability, shall be either the aggregate of

2.25 x Relevant Earnings x years of Accredited Service up to 31/12/1990,

2.8 x first M$1,000 of Relevant Earnings x years of Accredited Service from 1/1/1991,

2.5 x next M$1,000 of Relevant Earnings x years of Accredited Service from 1/1/1991, and

2.2. x balance of Relevant Earnings x years of Accredited Service from 1/1/1991;

OR

2.25 x Relevant Earnings x years of Accredited Service;

whichever level of benefit is the greater.

(b) The level of benefit for each year of Accredited Service applicable to a Member who has not reached age 55 but has Accredited Service of 25 years or more shali be 2.25 x Relevant Earnings.

Regulation 7(1)(c) provides:

7(1) The Authorised Deductions to be made in calculating the amount of a Member's benefit will be the sum of the following amounts:-

(a) ...

(b) ...

(c) Subject to sub-clause (3) hereof, the amount of any payments which any Company shall by law or pursuant to any collective contract or to

any award judgement or order of any Court or Tribunal be or have been required to make to the Member or any other person in respect of any part of the Member's Accredited Service by way of additional remuneration or benefit beyond his ordinary remuneration or in connection with any termination of his service with that Company; and for the purposes of this paragraph the expression 'collective contract' shall mean any agreement between the employer and any trade union or group of employees or any body or person on behalf of any employees; compound interest on the amounts stated in this paragraph shall run from the respective dates of each payment down to the relevant date;

Regulation 8(1) states:

8(1) When a Member leaves Company Service.

(a) on or after reaching age 55, or

(b) because of chronic disability,

he shall be entitled to be paid the net amount of his benefit calculated in accordance with Regulation 5 and, subject to the provisions of Regulation 9 hereof (if applicable), payment shall be made to him as soon as possible and in any event within 3 months after cessation of Company Service.

THE EPF PROVISIONS

Section 9(1) of the 1951 Act reads:

9(1) Notwithstanding any contract to the contrary, the employer shall not be entitled to deduct from the wages or remuneration of, or otherwise to recover from, the employee the employer's contribution.

Section 47(1) of the 1991 Act says:

47(1)Notwithstanding any contract to the contrary, the employer shall not be entitled to deduct or otherwise recover from the wages or remuneration of the employee, the employer's contribution, from the employee.

[21] On the above Regulations learned counsel for the appellants submitted that (in summary):

(a) in construing reg 5 due regard must also be placed to reg 8(1) which deals with the payment to be received by a former employee of his retirement benefit, namely an entitlement which is a net amount of his benefit calculated in accordance with reg 5;

(b) the 'term 'lump sum' is explained in reg 5(2) as the benefit due from this

fund sufficient to bring the aggregate of paras (a) and (b) in reg 5(2) to the level calculated in accordance with reg 5(3). The level calculated in accordance with reg 5(3) is the 'level of benefit'.';

(c) 'the reg 5(2) amount which equals the reg 5(3) amount includes a third element called the 'top-up' and not 'that the 'lump sum' in the formula must be the 'level of benefit' as understood by the Court of Appeal. Further, the Court of Appeal failed 'to give due weight to the words 'NET AMOUNT' in regs 5(1) and 8(1)'. Instead it erroneously held that 'it is the lump sum that is payable and not the net amount unless there is a net amount payable 'after making the deductions authorised by reg 7, if any' (instead of in every case) and concluded that if no deduction falls to be made under that regulation, the net amount is the full lump sum';

(d) it was the appellants' case 'all along that the lump sum' is arrived at under reg 5(2) by reference to the 'level of benefit' under reg 5(3) but what is paid as the retirement benefit is 'the net amount' which is arrived at by deducting from the lump sum the employers' EPF contributions and dividends. This is pursuant to the closing sentence of reg 5(2) which says in every case the lump sum shall be reduced by the Authorised Deductions mentioned in reg 7';

(e) 'Regulation 7 would have no relevance whatsoever to the questions at hand if not for the express reference to it in the qualifying words of reg 5(2). The importance of the qualifying words is underscored by the opening phrase 'In every case'. Further, reg 7 is expressly mentioned by reference to its heading 'Authorised Deductions.';

(f) 'Regulation 7 is captioned 'Authorised Deductions'. The opening words of reg 7(1) make it clear that it is a provision dealing with the calculation of a members benefit because it begins by saying 'the Authorised Deductions to be made in calculating the amount of a members benefit ...'. Sub-clause (a) authorises deduction of gratuities already paid to a former employee. Sub-clause (b) authorises deduction of any retirement benefit already withdrawn by the member;

(g) the nature of circumstances listed in sub-cl (c) of reg 7 are disjunctive nature of the circumstances listed in sub-clause (c) and not limited to payments in the form of compensation for loss of employment or redundancy payments or damages for wrongful dismissal as postulated by the respondents. Even the trustees did not construe sub-cl (c) in that fashion;

(h) to say that reg 7(1)(c) is not applicable because EPF contributions arre not payments made to a member but are payments made into a fund, indicates a failure to appreciate the legal character of the employers' contribution under our EPF scheme once it is made. EPF contributions

'do not belong to the fund or paid to the credit of the Fund but are paid to the credit of each employee's account';

(i) EPF payment is in the nature of pension and thus could be described as 'remunerative benefits'; and

(j) the Court of Appeal was wrong in not appreciating that the RBF formula provided for a deduction under reg 7(1)(c) which by its wordings authorised the deduction of the employers' EPF contributions.

[22] Learned counsel for the respondents dealt with the issue as may be concisely stated that:

(a) Regulation 5(1) provides that on a member leaving Company Service the benefit due from the RBF shall be calculated in accordance with the following provisions of that regulation and the net amount settled in accordance with reg 8;

(b) the 'level of benefit specified in reg 5(3) is by reference to a formula varying according to the age, length and date of service and reason for leaving service of the particular member'. Hence, 'Regulation 8(1) provides that when a member leaves Company Service at or after age 55 he shall be entitled to be paid the net amount of his benefit calculated in accordance with reg 5 and payment shall be made to him as soon as possible and in any event within 3 months after cessation of Company Service';

(c) 'it is clear from reg 5(2) that the lump sum is the sufficient amount to bring the EPF and PF benefits up to the guaranteed level determined under reg 5(3)';

(d) Regulation 7(c) does not apply as there was no 'Authorized Deduction' under it. The Regulation cannot be construed to allow a double deduction on employers' EPF contributions. Further, 'where one finds a specific provision (reg 5(2)) dealing with EPF contributions alongside a general provision (reg 7(1)), the general provision must give way to the specific';

(e) 'the words 'In every case' in reg 5(2) cannot be interpreted to mean that there is a deduction under each and every head of reg 7(1) in the case of each and every member'.

[23] At the outset we remind ourselves that RBF was a non-contributory pension fund. Learned counsel for the parties were also on common ground that the 'court's approach to the construction of documents relating to a pension scheme should be practical and purposive rather than detached and literal' (see *Mettoy Pension Trustees Ltd v Evans & Ors* [1990] 1 WLR 1587).

Thus, in practice, 'it is necessary to test competing permissible constructions of a pension scheme against the consequences they produce in practice. Technicality is to be avoided. If the consequences are impractical or over-restrictive or technical in practice, that is an indication that some other interpretation is the appropriate one' (see *British Airways Pension Trustees Ltd v British Airways* [2002] PLR 247).

[24] However, while learned counsel for the appellants emphasised that the 'rule to give practical effect to the pension scheme is to fulfill the objectives of the scheme', learned counsel for the respondents went on to submit that since the language of reg 5(2) is clear that should provide the surest guide to the meaning of the Regulations. 'The court should allow the Regulations to speak for themselves.'

[25] In fact the learned judicial commissioner outlined the purpose of the fund when he said this:

> The RBF is to provide for financial comfort and security for the employees upon their retirement. This is similar to any other established pension funds. The fact that the manner in which the benefit is paid out from the fund to the retiring employee may differ — either in one lump sum or a periodical payments over a period of time — does not alter the character of the fund from being a pension scheme providing for retirement benefits.

[26] The Court of Appeal expressed the same sentiment when it said this:

> It is obvious, therefore, the aim of the employers in establishing the RBF was to ensure that at the end of his service an employee will enjoy, or will have enjoyed, retirement benefits from all sources of at least a certain amount.

[27] However, while both the courts below understood the purpose of the RBF Fund they differed in the practical workings of the relevant provisions in Regulations 1976.

[28] At the court of first instance the learned judicial commissioner held that the benefit due should be in a lump sum which is an aggregate of the amount obtained under paras (a) and (b) of reg 5(2). The aggregate lump sum is 'further determined by the qualifying words at the end of reg 5(2). These qualifying words have the effect of determining the limit of the benefit payable to the retiring members. It also explains the use of the expression 'net amount' appearing in reg 5(1)'. The 'top up' argument did not find favour with the court of the first instance.

[29] On the level of benefit payable to a member the learned judicial commissioner was of the view that the 'formula in determining the level of benefit payable to a member of the Fund is provided under reg 5(3) ... The amount arrived at by using the formula is the level of benefit for the purpose of arriving at the aggregate lump sum under reg 5(2) before the authorised deductions' under reg 7'. And he reduced the formula to an equation:

Net Benefit: A+B = C–D

A being an amount under reg 5(2)(a);

B being an amount under reg 5(2)(b);

C being an amount under reg 5(3); and

D being an amount of Authorised Deductions under reg 7

[30] The learned judicial commissioner also held the view that the 'first and second defendants cannot now say that 'though we have promised the RBF as an additional benefits to the other provident or retirement funds set up by the government, we cannot give the full benefits because we have contributed to the PF and EPF' deductions'.

[31] The Court of Appeal did not agree with the interpretations given by the court of first instance. It held that 'the RBF was to ensure that at the end of his service an employee will enjoy, or will have enjoyed, retirement benefits from all sources of at least a certain amount. If the benefits from sources other than the RBF — that is the accrued benefits — do not come up to that amount, then the RBF will come in to make up for the deficiency by supplying it. The target amount is the level of benefit and the supplied deficiency is the benefit due from the RBF. It is a top-up. If there is no deficiency, the target of the RBF is reached and nothing is due from the RBF. Or if the accrued benefits are more than the level of benefit, as happened in the case of a few plaintiffs, the target has been exceeded, and nothing is due from the RBF. The member will be enjoying, or will have enjoyed, a greater amount of retirement benefits than the target set by the RBF.' In short the benefit due stipulated in reg 5 was held to be indeed a 'top up'.

[32] We have scrutinised carefully the conclusions by both the courts below having regard to the relevant provisions in question. We are also very conscious that we are construing provisions dealing with a pension fund. As such we must bear in mind the overall background of the scheme including an approach to be taken that is 'practical and purposive rather than detached and literal'.

[33] Regulation 5(1) is clear in that it stipulates:

(a) what a member gets ('the benefit due') from the fund when he leaves his employer;

(b) provided he satisfies the given preconditions therein; and

(c) such benefit due is to be calculated in accordance with reg 5; and

(d) that the net amount is to be settled in accordance with reg 8. A final figure ('net amount') is expected after a quantification exercise involving either addition or deduction.

[34] In order to determine the actual benefit due reg 5(2) and (3) have to be complied with. Shorn of the other preconditions we would think that one basic approach that should be adopted is to begin calculating first 'the level of benefit' as stipulated in reg 5(3) and then proceeding to determine the aggregate amount in accordance with reg 5(2). If the quantum of level of benefit is higher than the aggregate amount obtained under reg 5(2) then a lump sum from the fund is to be obtained so as to bring the aggregate amount up to the quantum level of the benefit under reg 5(3). That lump sum obtained from the fund is the benefit due as described in reg 5(1). Thus, we agree with the view expressed by the Court of Appeal when it said this:

> It is elementary that, arithmetically or accounting-wise, to arrive at the lump sum sufficient to bring the aggregate of the accrued benefits up to the level of benefit specified in sub-cl (3), all that needs to be done is to subtract or deduct the accrued benefits from the level of benefit and arrive at the difference or the top-up, which, if any, will be the lump sum.

[35] However, having stated the above the matter does not end there. The last sentence in reg 5(2) which reads 'In every case the lump sum shall be reduced by the Authorised Deductions mentioned in Regulation 7' still needs to be considered, its effect, purpose and meaning.

[36] On this last sentence the learned judicial commissioner gave it the ordinary meaning and found 'overwhelming evidence to support the fact the there were deductions made' of the contributions made under EPF or PF pursuant to reg 7.

[37] In contrast the Court of Appeal described the last sentence as setting out the deductions that are to be made, not in calculating the lump sum constituting the benefit due from the RBF, but 'in calculating the amount of a Member's benefit'. These words echo the words in reg 5(1): 'the benefit due from this fund shall be calculated in accordance with the following provisions of this regulation and the net amount thereof shall be settled in accordance

with reg 8', sub-cl (1) of which says: 'When a Member leaves Company Service ... he shall be entitled to be paid the net amount of his benefit calculated in accordance with reg. 5 ...'.' A

[38] Having considered the relevant provisions and the purpose of the fund as a whole we are in entire agreement with the views expressed by the Court of Appeals. One may say that the last sentence of reg 5(2) had caused the confusion. If so then any confusion had been correctly synchronised by the Court of Appeal with the purpose and objective of the fund. Simply put, all that last sentence requires is the determination of whether contributions to such fund as the EPF can come within the ambit of reg 7(1)(c). The Court of Appeal came to the conclusion that it could 'not recall that in any of the exhibited calculations any amount, besides the EPF and PF amounts that needed to be 18 subtracted to arrive at the sufficient lump sum, was pointed out to us as being a deduction under reg. 7'. This is a finding of fact which we should not interfere casually. B C D

[39] Meanwhile much was said on the meaning of the term 'net amount' as found in regs 5(1) and 8(1). However the Court of Appeal opined that it simply means that while the benefit due to a member from the RBF is the lump sum sufficient to bring the aggregate as stipulated in reg 5(2) up to the level of benefit specified in reg 5(3) 'what is actually paid to him is the net amount after making the deductions authorized by Regulation 7 if any'. The word 'if any' used by the Court of Appeal was also highlighted by learned counsel for the appellants in submission. In our view such words should be construed as referring only to an enquiry whether any deduction is indeed due or made under reg 7. E F

[40] On the status and legal implications of the deductions if any as specified in reg 5 the courts below also held differing views. G

[41] The learned judicial commissioner found there was deductions and held that they were 'unlawful and void against ss 9(1) and 47(1) of the 1951 and 1991 Acts respectively'. H

[42] However, the Court of Appeal gave a contrary view. It held that although there appeared to be deductions they were only 'an arithmetical or accounting way of arriving at the sufficient lump sum. They are not deductions by taking away from the member. The member is not deprived of the deducted EPF and PF contributions. Such deprivation there cannot be, when the whole idea of the RBF is to ensure that, with the accrued benefits, and any necessary top-up from the RBF, the member will at least enjoy his level of benefit.' I

A **[43]** We have considered the views of the courts below. We are inclined to agree with the conclusions of the Court of Appeal. Since there were no deductions in the sense alleged by the appellants the Court of Appeal was correct in its view that the respondents 'were right in their stand that in arriving at the lump sum they acted within reg 5(2) and that, as far as
B concerned the plaintiffs' grievance as to deductions made, the manner in which they arrived at the lump sum did not involve reg 7'.

[44] As such there is no question of contravention any of the relevant provisions in the 1951 Act and 1991 Act. In any event we agree with the
C observation by the Court of Appeal which it was entitled to make that the respondents could not have established the fund with ulterior motive. To have done so would not only be fraud upon their employees but also contravened the relevant provisions under the 1951 Act and 1991 Act. We would go a little further. If indeed the fund was established with some
D improper and illegal purpose then no one should benefit out of it including the appellants. Anyway in this case there was no direct allegation that the appellants did not receive their EPF benefits. What they were hoping for was additional benefits out of the fund.

E **[45]** Much have also been said on the scope of reg 7(1)(c). Learned counsel for the appellants was of the view that contributions by the appellants to funds such as the EPF and PF came within its ambit. The Court of Appeal did not think so. We agree. Indeed reading reg 7 as a whole it could not have
F been the intention to include contributions into funds such as EPF. It would have been so stated. Anyway, our overall reading of the scope of reg 7 is that it is more related to any additional payments made or due to a member of RBF but does not extent to include contributions described in reg 5.

G **[46]** Accordingly for the foregoing reasons we find no reason to differ from the conclusion arrived at by the Court of Appeal. As such having hereinabove dealt with the principles of law and related points in connection with questions (1), (2) and (5) we need not have to answer them in specific terms. For question (6) we would answer it in the affirmative and for question (9)
H we answer it in the negative.

ADMISSION AND ESTOPPEL (GROUNDS 3–4, 7–8)

I **[47]** The appellants rely on admission and estoppel on the basis that the funds (RBF and PF) had closed by 31 December 2003. It was contended that 'the method of calculation used by the trustees throughout the life of the funds was therefore binding on them. Moreover, there were admissions by the trustees of the fact of deductions of the employers' EPF contributions (and the dividends thereto) to arrive at the retirement benefit payable.' Several

instances were listed and alleged as indication of such fact of deductions or an admission. It was thus submitted that it 'is too late for the trustees to repudiate the method they had used'. The formula adopted resulted in the deductions made which the learned judicial commissioner declared to be 'ultra vires ss 9(1) and 47(1) of the relevant EPF legislations'.

[48] In response to this argument learned counsel for the respondents submitted, inter alia, that there's no 'such inconsistency, since the respondents accept that under reg 5(2) the employer's EPF contributions have to be subtracted from the guaranteed level of benefit under reg 5(3) in order to determine the lump sum due to the member' ... 'The fact that the word 'deduction' is used cannot be treated as an admission that the employer deducted the employer's contribution from the employee's wages or remuneration within the meaning of the EPF Acts. That is a question of law for the court'.

[49] On the issue of admission the Court of Appeal said that it had 'examined those instances and we find that where the defendants admitted making deductions they meant deductions in the arithmetical or accounting sense that has been explained, that is deductions for the purpose of determining the lump sum to which the plaintiffs were entitled from the RBF and not deductions from what they were entitled to from the RBF, but where they denied making deductions they meant deprivative deductions in the sense alleged by the plaintiffs ...'.

[50] On our part we have carefully scrutinised the analysis by the Court of Appeal on this issue in particular on the alleged deductions. We find no reason to differ. It is a well-reasoned finding having regard to the proper construction of the relevant provisions in the Regulations.

[51] Further, we are inclined to agree with the submission of learned counsel for the respondents that since the issue of estoppel, let alone the species of estoppel, was not raised amongst the questions posed for determination under O 14A it should not arise in this first appeal. This is in consonant with the proposition of law accepted in our jurisdiction that 'as a general rule, a new point cannot be raised in an appeal, which was not pleaded or argued in the courts below'.

[52] However the foregoing rule is subject to certain exceptions. They are, first, that a point of law could be taken up for the first time on appeal if it raised a question of jurisdiction (see *Hua Daily News Bhd v Tan Thien Chin & Ors* [1986] 2 MLJ 107); and, second, the Court of Appeal would entertain a point of law not raised in the court below if it would result in the rectification of an erroneous order' as for instance the effect of illegality (see

A *Yong Mok Hin v United Malay States Sugar Industries Ltd* [1967] 2 MLJ 9; *Muniandy & Anor v Muhammad Abdul Kader s/o Muhamad Saheed & Ors* [1989] 2 CLJ 577; *Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Ors* [1989] 1 CLJ 1 (Rep)). In considering this point however it is prudent to bear in mind what was said by Lord Wrenbury in *Banbury v Bank of*
B *Montreal* [1918] AC 626 at p 714:

> The result of the contention, if it be correct, is that the Court of Appeal is bound to make an erroneous order because of a point of law has been overlooked below. It may well be that under the circumstances the Court of Appeal could not justly
C allow the point of law to be raised. For instance, it may be that if the point had been raised in the court of the first instance the party whose interest it was to dispute it would or could have called evidence which would affect the result. If so, the Court of Appeal would no doubt say that it would not be fair to allow it to be raised. But that is a totally different thing from saying that it cannot be raised.

D

[53] We have considered the events and circumstances involved in this first appeal. Regrettably we are not persuaded that the point is within any of the exceptions.

E

[54] Even assuming for a moment that 'estoppel by convention' is relied upon as can be implied when learned counsel for the appellants referred to the case of *The Vistafjord* [1988] 2 Lloyd's Rep 343, we are nevertheless inclined to agree with learned counsel for the respondents that there is still
F the need for the appellants to evince clear evidence of positive conduct on the part of the members that each and every member has by his course of dealing put a particular interpretation on the terms of the rules (see *Redrow Plc v Pedley* [2002] PLR 339 followed in *Steria Limited & Ors v Ronald Hutchinson & Ors* [2006] EWCA Civ 1551).

G

[55] With respect we do not think the appellants came close to showing such evidence.

H **[56]** Accordingly we are not with the appellants on this issue of admission and estoppel. In view of our foregoing conclusion we do not think it is therefore necessary for us to specifically answer each and every question posed and categorised under the head of admission and estoppel.

I ULTRA VIRES (GROUNDS 10–11)

[57] On this head it is premised on the assertion that deductions were made pursuant to reg 7(1)(c) of the 1976 Regulations and that such act contravened s 9(1) of the 1951 Act and s 47(1) of the 1991 Act.

[58] As we have already addressed this point when considering the proper interpretation to be given to reg 5 of the 1976 Regulations we are therefore of the same view with the Court of Appeal that there were no deductions as such. If there were any appearance of deductions they were only 'an arithmetical or accounting way of arriving at the sufficient lump sum. They are not deductions by taking away from the member. The member is not deprived of the deducted EPF and PF contributions. Such deprivation there cannot be, when the whole idea of the RBF is to ensure that, with the accrued benefits, and any necessary top-up from the RBF, the member will at least enjoy his level of benefit.'

[59] Accordingly we do not think it is necessary for us to go into an analytical discussion as to what amounts to 'wages' in relation to the 'deductions' as propounded by the appellants. Doing so would merely be a speculative and academic exercise.

[60] Thus, we too find this issue to be without merit. As such our conclusion renders questions (10) and (11) speculative. We need not answer them specifically.

LIMITATION (GROUND 12)

[61] Notwithstanding the view expressed by the Court of Appeal on this head we do not think much turns on it irrespective of our answer to the question posed. Suffice it to say that our view on a similar contention raised under the head of admission and estoppel stands. Hence we decline to answer question (12).

THE SECOND APPEAL (QUESTIONS (1) AND (2))

[62] In respect of this second appeal leave was granted on two questions. They involve issues on unjust enrichment and breach of trust.

[63] It is to be noted that at the court of first instance the appellants failed on those issues. The learned judicial commissioner did not think that the benefits received by respondents 'by reason of operation of laws or contractual agreements can be regarded as benefits received at the expense' of the appellants. After all it is only when there is surplus in the fund and on the advice of the actuary that distribution to member companies could only take place. On the issue of breach of trust the learned judicial commissioner was of the view that there was no breach of trust committed since the trustees were merely doing their duties as imposed by reg 7(1).

[64] The Court of Appeal took the approach that since the issues of unjust enrichment and breach of trust were premised that there had been wrongful deductions and since in its judgment there were no such deductions the appeal had to be dismissed with costs.

[65] As indicated earlier on we are inclined to agree with the Court of Appeal that there were no deductions as asserted by the appellants. As such we too take the course that this second appeal should be dismissed with costs.

[66] Accordingly we need not answer the questions posed in this second appeal.

CONCLUSION

[67] For the reasons given above these appeals are dismissed with costs and order that the deposits are to be paid to the respondents to account of taxed costs.

Appeals dismissed with costs.

Reported by Kohila Nesan